BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAM ABBOTT	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,412
RENZENBERGER, INC.	)	
Respondent	)	
AND	)	
	)	
ITT HARTFORD	)	
Insurance Carrier	)	

ORDER

Respondent and claimant both appeal from an Award entered by Administrative Law Judge John D. Clark on April 14, 1998. The Appeals Board heard oral argument November 23, 1998.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The nature and extent of claimant's disability is the only issue on appeal. The ALJ awarded a 62.5 percent work disability based on a 25 percent loss of ability to perform tasks and a 100 percent wage loss. Claimant contends he is permanently and totally disabled. Respondent contends claimant is able to work but has not made a good faith effort to find employment. Respondent asks the Board to impute either a comparable wage and limit the award to functional impairment or, in the alternative, impute a wage based on testimony of a vocational expert and award a lower work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified. Claimant is awarded benefits for a 41 percent work disability.

Findings of Fact

1. Respondent contracted to transport railroad employees from location to location in a van. Claimant drove one of the vans for respondent.

2. On September 25, 1996, claimant transported railroad employees from Coffeyville, Kansas, to Van Buren, Arkansas, and on the return trip was involved in a serious accident when his van struck a car sitting broadside in his lane as he came over a rise in the road.

3. After treatment in the emergency room, Dr. James W. Zeiders, a board-eligible orthopedic physician, became claimant's treating physician. Dr. Zeiders treated claimant from September 30, 1996, through April 22, 1997. Dr. Zeiders had treated claimant for forearm and ankle injuries before this accident.

4. Dr. Zeiders diagnosed fracture of T11, T12, and L1 vertebrae. He also found small herniated discs at five levels and fracture of the sacrum, all superimposed on preexisting arthritis. He recommended rest as treatment.

5. In January 1997, Dr. Zeiders wrote that he thought claimant would recover in 4 to 5 months and could return to work. In February 1997, Dr. Zeiders concluded claimant could be returned to his regular job in one month. Dr. Zeiders' notes from the examination on February 11, 1997, state he expected claimant should have minimal impairment:

> I think he is making an adequate recovery. He may harbour some permanent impairment in his back following this injury but it should be minimal.

6. After the examination on March 4, 1997, Dr. Zeiders released claimant to his regular job driving a van to see if he was able to do the job.

7. Claimant did return to work and worked four days. He testified the vibration caused him to hurt so much that he had to stop and claimant concluded he could not continue with the job. Claimant then resigned and no accommodated job was offered. Claimant testified he has since looked for jobs in the newspaper.

8. Dr. Zeiders saw claimant after claimant left work for respondent and ultimately rated the impairment as a 32 percent impairment to the body as a whole. But he also concluded and testified that claimant is permanently totally disabled, as a result of the combination of the work-related injury and the preexisting arthritic condition, from any substantial and gainful employment. Dr. Zeiders concluded claimant had more injury than he had originally thought.

He reviewed a list of tasks claimant had performed in the 15 years before the current accident. Dr. Zeiders concluded claimant can not do 10 out of 14, or 71 percent. He also

testified that if he were to give restrictions, he would limit claimant to the sedentary category of work with no stooping, bending, or lifting, and no work at heights or around power machinery. He did not think claimant could sit or stand very long; claimant would need freedom to move.

9. In November 1997, at the request of respondent's insurance carrier, claimant was examined and his injury evaluated by Dr. P. Brent Koprivica. Dr. Koprivica rated claimant's impairment at 15 percent of the whole body based on compression fractures of T11, T12, and L1 with a probable sacral coccygeal nondisplaced fracture. Dr. Koprivica also noted multiple level degenerative disc disease and small disc herniations, both preexisting. He recommended claimant be limited to the medium category of work which allows lifting 50 pounds occasionally and 20 pounds frequently. He also specifically recommended claimant avoid captive sitting and avoid standing and walking more than one hour. He recommended claimant change posture, avoid frequent or constant bending at the waist, avoid pushing, pulling, and twisting, and avoid sustained or awkward postures of the lumbar spine.

Dr. Koprivica disagreed with Dr. Zeiders' method of computing impairment under the AMA Guides and, unlike Dr. Zeiders, did not include impairment for the herniated discs. Dr. Zeiders considered the discs to be a result of the accident, but Dr. Koprivica thought them to preexist the accident. If the herniated discs are added, he would consider the functional impairment to be 25 percent of the whole body.

Dr. Koprivica agreed with the opinion of vocational expert Karen C. Terrill that claimant lost the ability to perform 17 percent of the tasks he had performed in the previous 15 years of employment. But he added that claimant could drive only if allowed to move around for 5 to 10 minutes each hour. If claimant is not able to do so, his opinion of the task loss would change. If the driving is excluded, claimant had, according to Dr. Koprivica, lost the ability to perform 25 percent of the tasks claimant had performed in the previous 15 years of employment.

Dr. Koprivica agreed that claimant should not violate the restrictions of his treating physician, but made this statement conditioned on the assumption the restrictions were appropriate.

10. In June 1997, claimant was examined by Dr. Edward J. Prostic at the request of claimant's counsel. He diagnosed three compression fractures. He agreed with Dr. Koprivica that the herniated discs preexisted the accident. He rated the impairment as 16 percent of the whole body. He recommended claimant avoid lifting greater than 25 pounds occasionally or 10 pounds frequently. He also recommended claimant change positions frequently and avoid frequent bending or twisting at the waist, avoid forceful pushing or pulling, and avoid vibrating equipment. At a second deposition, he testified claimant could not perform 67 percent of the tasks he performed in the previous 15 years of employment.

11. Ms. Karen C. Terrill, a vocational expert, saw claimant at respondent's request. She prepared a list of tasks claimant did during the previous 15 years. From what claimant told her, she considered claimant's efforts at finding employment to be minimal. She opined that claimant could earn $6 to $6.50 per hour.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. Permanent total disability means completely and permanently unable to engage in any substantial gainful employment. K.S.A. 44-510c. The statutory definition has been construed to include an employee who is essentially and realistically unemployable. *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

3. The Board concludes claimant is not permanently and totally disabled. Although Dr. Zeiders ultimately concludes claimant is permanently and totally disabled, the Board does not find this conclusion persuasive. Dr. Zeiders originally believed claimant would have minimal impairment. While an opinion about disability certainly may change, the Board does not consider Dr. Zeiders' change of opinion to be adequately explained. Dr. Prostic and Dr. Koprivica both give opinions which are not consistent with a finding that claimant is permanently and totally disabled. Finally, Ms. Terrill provides an opinion that claimant can earn from $6 to $6.50 per hour, also in conflict with a finding that claimant is permanently and totally disabled.

4. K.S.A. 1996 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based

on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. In this case, the Board finds claimant has not made a good faith effort to find employment since his injury. The record shows only that he has looked in the newspaper. Claimant contends he has not aggressively sought employment because his treating physician considers him to be permanently and totally disabled. But the Board has, based on the record as a whole, concluded claimant is not permanently and totally disabled. A wage should, therefore, be imputed to claimant based on what claimant has the ability to earn.

7. The Board finds claimant has the ability to earn $6 per hour or $240 per week. Ms. Terrill has opined claimant has the ability to earn $6 to $6.50 per hour, but she does not provide examples or explanation of what specific work he might obtain. The Board, therefore, has adopted the lower of the projected wages.

8. When claimant's wage earning ability is compared to the preinjury average weekly wage of $375.27, claimant has a 36 percent wage loss.

9. The Board also finds claimant has a task loss of 46 percent. This conclusion is based on Dr. Koprivica's 25 percent loss opinion which includes loss of ability to drive and Dr. Prostic's opinion claimant has a 67 percent loss. The Board has not factored in Dr. Zeiders' task loss opinion for the same reason the Board has not accepted Dr. Zeiders' opinion that claimant is permanently and totally disabled.

10. Claimant has a work disability of 41 percent based on a task loss of 46 percent and a wage loss of 36 percent. K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on April 14, 1998, should be, and hereby is, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sam Abbott, and against the respondent, Renzenberger, Inc., and its insurance carrier, ITT Hartford , for an accidental injury which occurred September 25, 1996, and based upon an average weekly wage of $375.27, for 23.29 weeks of temporary total disability compensation at the rate of $250.19 per week or $5,826.93, followed by 166.75 weeks at the rate of $250.19 per week or $41,719.18 for a 41% permanent partial disability, making a total award of $47,546.11.

As of December 31, 1998, there is due and owing claimant 23.29 weeks of temporary total disability compensation at the rate of $250.19 per week or $5,826.93, followed by 94.85 weeks of permanent partial disability compensation at the rate of $250.19 per week in the sum of $23,730.52, for a total of $29,557.45 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $17,988.66 is to be paid for 71.9 weeks at the rate of $250.19 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Richard J. Liby, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director